UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re: Case No.: 95-13501

Aquatic Development Group, Inc. Chapter 11

Debtor.

Appearances:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum-Decision & Order

The present matter was brought before the court by a motion of the United States Trustee's Office ("UST") requesting that the Debtor, Aquatic Development Group, Inc. ("Debtor"), be required to provide a Status Report Detailing Post-Confirmation Steps and Obstacles to Substantial Consummation. Alternatively, the motion requests that the case be converted from Chapter 11 to Chapter 7. The Debtor replied with a Motion For Approval of

Final Decree *Nunc Pro Tunc*. The UST[1] objected to this request.

Jurisdiction

This is a core proceeding and the court has jurisdiction pursuant to 28 U.S.C. § 157(a)(2)(A) and § 1334(b).

Facts

The facts, subject to a duly acknowledged stipulation,[2] follow:

1. The Debtor and seven related entities commenced eight related cases by filing voluntary petitions under Chapter 11 of the United States Bankruptcy Code on September 19, 1995. On the Debtor's motion, the cases numbered 95-13501 through 95-13508 were ordered substantively consolidated October 2, 1999.

2. The Debtor's plan of reorganization and disclosure statement were filed with the court on November 6, 1995.

3. On December 22, 1995, the Debtor filed Adversary Proceeding No. 95-91312 against William Thomas Enterprises, LLC and William Thomas individually.

4. On December 29, 1995, the court conditionally approved the Debtor's disclosure statement and set confirmation for January 18, 1996.

5. On January 4, 1996, the Debtor filed its amended disclosure statement and plan.

6. The plan provides that Class V allowed secured claims are to be paid in accordance with the terms of a settlement agreement entered into among the Debtor and United Community Insurance Company in Rehabilitation, United Republic Insurance Company, and Albert W. Lawrence prior to filing of the Chapter 11 petition. The Settlement Agreement provided for the issuance of 22,500 shares of preferred stock to be redeemed commencing with the fiscal year

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[1]The unsecured creditor's committee also objected to the request for final decree. However, the committee's concerns have apparently been addressed and the objection has been withdrawn.

[2]The facts are taken wholly from the stipulation offered by the parties. The court has not made spelling or grammatical changes, however, it has redacted extraneous facts.

ending December 31, 1999, by annual payments equal to 20% of Debtor's after tax net income and also a cash payment of $150,000 to be made on the effective date of the plan.

7. The plan provides for payment of impaired classes by the issuance of a second new series of preferred stock or, in the sole discretion of the Debtor, a lump sum cash payment to the unsecured creditors. The stock was to be redeemed commencing no later than May 15, 2000 by annual payments equal to 20% of Debtor's net after tax income.

8. The third paragraph of Article Four extinguishes all existing equity interests as of the effective date of the plan.

9. Pursuant to the plan the court retains jurisdiction "... until there is substantial consummation of the Plan" and "[t]he Court shall retain jurisdiction over all litigation now pending before it or commenced prior to the Effective Date until completed by entry of final order or judgment, stipulation of dismissal or otherwise."

10. On January 11, 1996, the UST filed an objection to confirmation based upon $11,000.00 in fees due through the date of confirmation; $7,500.00 was allocated to this Debtor and the rest to the other seven debtors that had been substantively consolidated.

11. On January 18, 1996, a combined hearing on the adequacy of the amended disclosure statement and confirmation of the plan was held.

12. The effective date of § 211 of the Balanced Budget Downpayment Act. 1, Pub. L. No. 104-99, 110 Stat. 26, 3 7-3 8 (1996) amending 28 U.S.C. § 1930(a)(6), was January 27, 1996.

13. The confirmation order was entered on February 16, 1996.

14. The confirmation order contains two separate paragraphs referring to fees due to the UST.

15. The first paragraph of the confirmation order states, "[O]rdered, that all fees due to the Office of the United States Trustee shall be timely paid."

16. As attested to, a special notice of the enactment of P.L. 104-99 was mailed to all debtors whose cases were still pending, and all debtors whose cases were closed that still had unpaid quarterly fees, informing them that the fees to the UST were due because of the change of the law effective January 27, 1996. The notice to

this Debtor was addressed to Aquatic Development Group, Inc., P.O. Box 648, Cohoes, N.Y. 12047, the Debtor's regular billing address.

17. The second paragraph of the confirmation order states, "[O]rdered, that ADG pay to the United States Trustee the appropriate sum required pursuant to 28 U.S. C. § 1930(a)(6) within ten (10) days of the entry of this Order and simultaneously to provide to the United States Trustee an appropriate affidavit indicating the cash disbursements for the relevant period."

18. The confirmation order provides that the Debtor shall make payment of $50,000.00 for the benefit of the unsecured creditors on the plan's effective date.

19. The confirmation order further provides that the plan is contingent upon the court approving post confirmation borrowing to be obtained by the Debtor. This approval occurred by order dated July 5, 1996.

20. On June 26, 1996, the UST wrote a letter to the Debtor's attorney[3] detailing how the office had computed the $11,000.00 in fees due. It also states, "pursuant to Pub. L. No. 104-99, section 111, amended January 27, 1996, the fees continue to accrue until the case is closed by the Court, or otherwise dismissed or converted to another chapter." It then gives the amounts due in table format and states, "the Debtor will owe the fee for the **second quarter, 1996** in the amount of $3,750.00." (Emphasis as in original.) The letter is copied to the Debtor's president, Herbert S. Ellis, at the Debtor's address.

21. On August 19, 1996, the Debtor paid the $11,000.00 UST fee. A cover letter drafted by the Debtor's attorney,[4] accompanied this payment, stating, "I understand there will be some additional fees."

22. On August 21, 1996, interim post-confirmation financing in the amount of $525,000.00 was consummated. At the closing for the interim financing, the Debtor issued and delivered (i) a single stock certificate for 22,500 shares of Series A preferred stock and a check for $150,000 to the New York State Insurance Department, acting on behalf of the secured creditors; (ii) a single stock certificate for 15,000 shares of Series B preferred stock to its bankruptcy attorneys, DeGraff, Foy, et al., acting as agent for the unsecured creditors; and (iii) a check in the amount of $154,000.00 to DeGraff, Foy, et al., which check

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[3]During a majority of the proceedings the Debtor was represented by Degraff, Foy, Holt-Harris & Kunz, LLP. However, in December 1999, Ralph Bandel, Esq. was substituted as counsel.

[4]See n.3.

included the $50,000.00 to be distributed to the unsecured creditors. No officer or employee of the Debtor was ever authorized to direct anyone at the DeGraff law firm not to issue individual shares of stock to the unsecured creditors.

23. Post-confirmation, the Debtor made two voluntary payments to the UST for fees.

24. The first payment of UST fees was on September 19, 1996 for $3,750.00.

25. The second payment of UST fees was also for $3,750.00 and was made on November 4, 1996.

26. On December 5, 1996, the balance of the post-confirmation financing in the amount of $1,125,000.00 was completed.

27. By letter dated February 7, 1997, Debtor's counsel advised it that "the Plan of Reorganization has been confirmed and necessary payments to achieve substantial consummation have been completed" and that the company was "out of bankruptcy."

28. On January 12, 1999, the court issued a Memorandum, Decision and Order in Adversary Proceeding No. 95-91312.

29. On April 9, 1999, prior to the issuance of individual certificates of Series B preferred stock, Debtor wrote to all unsecured creditors offering to buy their unissued stock immediately at a discounted rate. Pursuant to an early buy-back agreement that had previously been consummated with the Series A preferred stockholder, the terms of the early buy-back offer to the unsecured creditors were the same as those accepted by the Series A preferred stockholder. The early buy-back offer was accepted by the great majority (approximately 90%) of the unsecured creditors and checks were issued in accordance with the amount offered between July 22, 1999 and December 1, 1999. Stock certificates for the remaining unsecured creditors (except those that Debtor determined had gone out of business) were executed on December 30, 1999 and mailed January 4, 2000.

30. The confirmation order contains a specific extension of the Court's jurisdiction by defining “substantial consummation” as occurring "... only when all payments to be made to the holders of general unsecured claims under the Plan have been made."

31. In early June 1999, the UST discovered, through review of its records, that no Final Decree had been entered placing at issue payments to creditors and fees due to the UST. Written inquiry was made of Debtor's attorney on June 11, 1999, July 8, 1999 and July 22, 1999.

32. On September 30, 1999, the Debtor filed its Report of Substantial Consummation and Application for Final Decree.

33. On October 18, 1999, the UST filed an Objection to Entry of Final Decree.

34. On October 20, 1999, the UST received a certified statement from the Debtor's chief financial officer detailing the amounts of gross disbursements for each month and quarter from October 1996 through September 1999 and indicating the UST fees due based upon these disbursements totaled $114,500.00.

35. Since the information is not yet due[5], the UST has no information regarding disbursements for the fourth quarter of 1999 or the first quarter of 2000.

36. On December 20, 1999, the court entered an order dismissing Adversary Proceeding No. 95-91312 with prejudice.

37. For each and every quarter since the inception of the case, the UST has sent a bill for quarterly fees due pursuant to 28 U.S. C. § 1930(a)(6) to the Debtor at its regular business address. The back of each bill contains the following directive: "Consult your attorney if you are in doubt whether the quarterly fees apply to your case."

38. The Debtor has no record of receipt of the special notice referred to in paragraph 16 but did receive a copy of the letter referred to in paragraph 20 and the quarterly billings referred to in the preceding paragraph.

Arguments

The Debtor argues that this case was substantially consummated on December 5, 1996 when it obtained the final refinancing necessary to implement its plan. It argues that the refinancing was the only contingency in the confirmation order, and once obtained, the order became final; payments had commenced and substantial consummation had occurred. The Debtor states that on December 5, 1996, a final decree would have been appropriate and *nunc pro tunc* relief should be granted.

[5]The information was not due when the stipulation of facts was executed.

The UST argues that the Debtor has not met the requirements for *nunc pro tunc* relief. It contends that substantial consummation could not have occurred until all payments to unsecured creditors had been made and until the adversary proceeding was resolved. It argues that a final decree would not have been proper until January 2000 when all outstanding issues were settled.

Discussion

It is beyond argument that a bankruptcy court, as a court of equity, has an inescapable duty to ensure fundamental fairness. *Securities & Exchange Comm. v. United States Realty & Improv. Co.,* 310 U.S. 434 (1940); *In re Chanticler Assoc. Ltd.,* 592 F.2d 70 (2d. Cir. 1979). One of the devices at a court's disposal in this endeavor is the *nunc pro tunc* order.

Requirements for Nunc Pro Tunc Relief

Courts have determined that *nunc pro tunc* relief is available. However, it is extraordinary and should be granted only in limited circumstances. *In re Keren Ltd.*, 189 F.3d 86 (2d. Cir 1999) (citing *In re Jarvis*, 53 F.3d 416 (1st Cir. 1995)). The Second Circuit has addressed the requirements for this type of relief, stating:

> Nunc pro tunc approval shall be granted in narrow situations and requires that (i) if the application had been timely, the court would have authorized the [relief], and (ii) the delay in seeking court approval resulted from extraordinary circumstances. *In re Keren Ltd.*, 189 F.3d at 86.

The UST argues that these requirements have not been met. Not surprisingly, the Debtor disagrees.

A. If the application had been timely, would the court have granted the requested relief?

The UST argues that if the Debtor had applied for a final decree in December 1996, the application would have been denied. It contends that the confirmation order specifically defines substantial consummation and that those requirements had not been met. The UST further asserts that since an adversary proceeding was pending, the case was not fully administered and a final decree would have been inappropriate.

The Debtor concedes that the confirmation order has a specific definition of substantial consummation but contends that the decretal paragraph was complied with when it issued stock payments to the unsecured creditors. It further argues that all contingencies in the confirmation order had been fulfilled and a final decree would have been warranted in December 1996. Finally, the Debtor contends that there is precedent for issuing a final decree with a court retaining jurisdiction over an adversary proceeding; it cites *In re Jr. Food Mart of Ark.,* 201 B.R. 522 (Bankr. E.D. Ark. 1996), as support for this proposition.

The first question that must be addressed in determining whether this court would have issued a final decree in December 1996 is whether it could have granted such relief. The UST seems to be arguing that the Bankruptcy Code and Rules prohibit this relief. It states,

> On December 5, 1996 there was pending an adversary proceeding (Adv. No. 95-91312) filed by the debtor. The matter went to trial and had a memorandum decision entered in the debtor's favor on January 12, 1999. An appeal of that decision was taken and the adversary proceeding was not closed until December 20, 1999. Thus, this case could not have been closed under the Bankruptcy Code and the Bankruptcy Rules. (UST's Memorandum in Opposition to Debtor's Application for a Final Decree, pp. 10-11)

The UST further asserts that the case relied upon by the Debtor to support its contention that the court could close a case while retaining jurisdiction over the adversary proceeding is factually

distinct and inapplicable.

The UST's contention that this court could not have issued a final decree in December 1996 is incorrect. While the case relied upon by the Debtor might be factually distinguishable from the present case, it does stand for the proposition asserted. More important, however, is that the Second Circuit has addressed this issue and has concluded that a bankruptcy court can terminate a case while retaining jurisdiction over an adversary proceeding. *In re Porges*, 44 F.3d 159 (2d. Cir 1995).

In *Porges*, the Court of Appeals was asked whether the bankruptcy court had properly retained jurisdiction over an adversary proceeding after it had dismissed the bankruptcy case. In deciding that the bankruptcy court had acted appropriately, the Court of Appeals stated,

> We join several other circuits in adopting a general rule that related proceedings ordinarily should be dismissed following the termination of the underlying bankruptcy case . . . Notwithstanding this general rule, however, nothing in the Bankruptcy Code requires a bankruptcy court to dismiss related proceedings automatically following the termination of the underlying case. (citations omitted). *Id.* at 161.

Thus, there is authority in this circuit for a bankruptcy court to terminate a case and retain jurisdiction of a related adversary proceeding, despite the UST's assertions to the contrary.

The UST further argues that the court could not have issued the final decree in December 1996 because the confirmation order specifically extended the court's jurisdiction "by defining 'substantial consummation' as occurring only when all payments to be made to the holders of general unsecured claims under the Plan have been made" and that the "[p]ayments, including the issuance of stock certificates, to unsecured creditors were not finalized until January 4, 2000." (United States Trustee's Memorandum in Opposition Dated February 10, 2000 pp. 14-15.)

On the other hand, the Debtor urges this court to view this specific provision as fulfilled in August 1996, when it issued the stock to its attorney acting as the agent for the unsecured creditors.[6] (Debtor's Memorandum dated January 27, 2000 p. 4.)

Due to the extraordinary circumstances of this case, the court will undertake an analysis of the provision in its order.[7] As noted, the paragraph in question defines substantial consummation as occurring when "all payments to be made to the holders of general unsecured claims ... have been made." There are various definitions of the term payment, including:

> The fulfilment of a promise, or the performance of an agreement. A discharge of an obligation or debt, and part payment, if accepted, is a discharge pro tanto.
>
> In a more restricted legal sense payment is the performance of a duty, promise or obligation, or discharge of a debt or liability, by delivery of money or other value by a debtor to a creditor, where the money or other valuable thing is tendered and accepted as extinguishing debt or obligation in whole or in part. Also the money or other thing so delivered. (citation omitted.)
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> Payment is a delivery of money or its equivalent in either specific property or services by one person from whom it is due to another person to whom it is due. (citation omitted.) BLACK'S LAW DICTIONARY 1016 (5th ed. 1979).

These definitions indicate that the term "payment" includes more than a strict transfer of

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[6]This court is uncertain when, how or why the Debtor's attorney assumed the role of agent for the unsecured creditors. The court's docket and case file do not indicate any official sanctioning of this agreement. If this arrangement had been brought to the court's attention then it would have pointed out the possibility of a conflict. However, the parties have stipulated that the Debtor's attorney was acting as the agent for the unsecured creditors committee, and therefore, the court will accept it as fact.

[7]It is undisputed that a court is empowered to, and is in the best position to review its own orders. *See, In re Casse*, 198 F.3d 327 (2d Cir. 1999) ("[I]f a bankruptcy order of dismissal is ambiguous in this regard, the bankruptcy court's interpretation of its own order 'warrants customary appellate deference. The bankruptcy court is in the best position to interpret its own orders.'(citation omitted)." *Id*. at 333. *See also,* Tomlin *v. Tomlin*, 105 F.3d 933 (7th Cir. 1997) citing *In re Chicago Rock Island & Pac. R.R. Co.,* 860 F.2d 267 (7th Cir. 1988). It must be noted that this court undertakes this analysis solely because it is reviewing its own order.

cash. Thus, the unrestricted transfer of the stock to the agent[8] for the unsecured creditors is sufficient to satisfy the definition of "all payments...to the holders of general unsecured claims" in the confirmation order notwithstanding the fact that the actual cash payments redeeming this stock did not occur until some time in the future. Therefore, this court concludes that the decretal paragraph was complied with when the stock was issued to the agent for the unsecured creditors.[9]

Having decided that the court could have issued a final decree in December 1999, leads to the further question of whether it would have done so.

The issuance of a final decree is governed by Bankruptcy Rule 3022 which states, "After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on a motion of a party in interest, shall enter a final decree closing the case." Since this section does not define "fully administered" and because this phrase is susceptible to various interpretations the court will look to the legislative history for guidance. The Advisory Committee Notes to this section state:

> Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Factors that the court should consider in determining whether the estate has been fully administered include: (1) whether the order confirming plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or successor of the debtor under the plan has assumed the

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[8]See n.6.

[9]The fact that these payments were made to the agent for the creditors, without restriction (Stip. of Fact ¶ 22), is crucial to the court's determination. It is an accepted tenet of general agency law that payment to an authorized agent for the principal equates to payment to the principal. *See generally*, *G.M.A.C. v. Finnegan*, 592 N.Y.S.2d 570 (Sup. Ct. Orange Cty. 1992); 2A NY JUR Agency §§ 140, 246, 247 (1988).

> business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been fully resolved.

Directed by the factors enunciated in the legislative history and after careful deliberation, the court concludes that if a timely application had been made the court would have granted the request and issued the final decree in December 1996. At that time, the confirmation order had become final because the refinancing had been completed; the deposits had been paid, the stocks and cash had been transferred to the agents of the creditors and the payments had commenced in August 1996. Also, the Debtor had assumed management of the business. All but one of the factors necessary for the final decree had been met, and since there is precedent for the closing of case with retention of jurisdiction of the adversary, the final decree would have been entered. *In re Porges*, 44 F.3d 159 (2d. Cir 1995); *In re Jr. Food Mart of Ark.,* 201 B.R. 522 (Bankr. E.D. Ark., 1996).

Finally, the UST argues that the Debtor failed to meet the requirements of Local Rule 3022-1(b). This rule incorporates Bankruptcy Rule 3022 which, as discussed above, was met. The fact that the Debtor did not comply with the reporting requirements of the Local Rule stems from the fact that the Debtor did not request the relief in December 1996. However, the determination that if requested the relief would have been granted necessarily encompasses the fact that the reporting requirements would have been fulfilled.

The first prong for *nunc pro tunc* relief has been met.

B. Extraordinary Circumstances

The extraordinary circumstances, those leading to the delay in the application, include: the prolonged nature of this plan; and the timing of the amendment of 28 U.S.C. § 1930; the

consequences of that change; and the failure of the parties to adequately monitor the progress of this case.

The terms of the Debtor's confirmed plan provide for payment to creditors by stock issuances, buy back options and redemption procedures. These unique provisions led to the case being open post-confirmation for several years.[10] This lengthy post-confirmation period would not have raised any concern when the plan was filed or when the confirmation hearing was held. However, when § 1930 was amended,[11] after the confirmation hearing but before the order was submitted, the consequences became staggering. The Debtor points out,

> ADG's reorganization plan provided for redemption of the preferred stock issued to unsecured creditors out of a percentage of after-tax net income. Redemption payments were not required to begin for almost five years and redemption thereafter could drag on for five or more years. If the plan was interpreted literally, this could have resulted in aggregate payments, from a company struggling to keep its doors open, to the UST in excess of $400,000.00. (Debtor's Memorandum of Law p. 4)

The court cannot fathom a situation where this type of result would be equitable or would serve the Code's underlying purpose of providing deserving debtors a fresh start. This is especially true when the continued accumulation of UST fees was not a consideration when this

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[10]This plan was orally confirmed on January 18, 1996 and the confirmation order was signed on February 16, 1996. By the terms of the plan, stock was "to be redeemed commencing no later than May 15, 2000..."

[11]When this plan was drafted, filed and orally confirmed § 1930(a)(6) stated, "In addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quater ... until a plan is confirmed or the case is converted or dismissed, whichever occurs first."

The section was amended, effective January 27, 1996 to remove confirmation as a trigger for the discontinuance of UST fees and now the section states, In addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quater ... until the case is converted or dismissed, whichever occurs first.

plan was filed or when the confirmation hearing was held. If this plan were submitted and the confirmation hearing were held after the amendment, a different result might be warranted. However, the timing of this amendment with respect to this Debtor results in an extraordinary circumstance.

The UST is correct in asserting that the confirmation order specifically references its fees.[12] However, this was standard language utilized in all confirmation orders prior to the effective date of the amendment and demonstrates the disastrous effect that it might otherwise have had upon this particular Debtor. Furthermore, the facts indicate that the Debtor did pay the UST fees that were due at the time of confirmation, and therefore, that provision of the order was met.

2. Failure of the parties to monitor the progress of this case

The extent of the UST's monitoring of this case, post-confirmation, consisted of it sending quarterly billings to the Debtor specifying an amount owed and indicating that if there were any dispute with respect to the bills that the Debtor should contact its attorney. (Stip. of Facts ¶ 35.) However, the UST did no other follow up; it did not contact the Debtor for payment of the fees nor did it monitor the case in any other manner. In fact, the status of this case was not discovered and questioned until June 1999, more than three years after confirmation. (Stip. of Facts ¶ 25.) This case, quite frankly, slipped through the cracks.

The Debtor should have reacted to these billings in some manner. However, with no

[12]The order states, "ORDERED that ADG pay the United States Trustee the appropriate sum required pursuant to 28 U.S.C. 1930(a)(6) within ten (10) days of the entry of this Order and simultaneously provide the United States Trustee an appropriate affidavit indicating the cash disbursements for the relevant period.

follow-up by the UST, no request for payment and no further contact in any manner by the UST, it is quite conceivable the Debtor believed the billings were in error. This is further underscored because, on February 7, 1997, the Debtor's former attorney had represented that, "the Plan of Reorganization has been confirmed and necessary payments to achieve substantial consummation have been completed." (Stip. of Facts ¶ 21.) The letter further advised that the Debtor was "out of bankruptcy." (Stip. of Facts ¶ 21.) Thus, the Debtor's inaction, while not to be commended nor condoned, is understandable.

Finally, the UST argues that equity cannot be invoked to circumvent this statute. However, *nunc pro tunc* relief in this specific case would necessarily be the invocation of equity; not to undercut Congress' intent but to acknowledge the Debtor's compliance with those requirements at an earlier moment in time.

Conclusion

For the above-mentioned reasons, the Debtor's request for a final decree is approved *nunc pro tunc* to December 5, 1996. The Clerk is directed to statistically close this case upon the expiration of time to appeal or any extension thereof.

It is so ORDERED.

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge